

# PUBLICATION

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## SEC Proposes Rules to Permit Advertising in Rule 506 Offerings and Rule 144A Resale Transactions

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### Background

On August 29, 2012, the Securities and Exchange Commission (SEC) proposed rules to permit advertising in Rule 506 offerings and Rule 144A resale transactions. The proposed rules are the result of a mandate from the Jumpstart Our Business Startups Act of 2012 (JOBS Act). The JOBS Act requires the SEC to remove the ban against general solicitation and general advertising in private offerings that are exempt from registration under Rule 506 of Regulation D and resale transactions that are exempt from registration under Rule 144A of the Securities Act. (For more information on how the JOBS Act will impact Rule 506 offerings and Rule 144A resale transactions, [click here](#).)

### The Proposed Rules

To implement the JOBS Act mandate, the SEC proposed new Rule 506(c) (Proposed Rule 506(c)). If adopted, Proposed Rule 506(c) would remove the Rule 502(c) prohibition against general solicitations and general advertising in certain Rule 506 offerings. Additionally, the SEC proposed a revision to Form D that would add a checkbox to indicate whether an offering is made pursuant to Proposed Rule 506(c). The SEC also proposed an amendment to Rule 144A that would permit advertising to persons other than "qualified institutional buyers" so long as the seller "reasonably believes" the purchasers are qualified institutional buyers.

To use Proposed Rule 506(c), all of the purchasers of the securities must be accredited investors, and the seller must take reasonable steps to verify the purchasers are accredited investors. Neither the JOBS Act nor Proposed Rule 506(c), however, describes these "reasonable steps." Due to the different types of sellers and accredited investors, the SEC proposed a flexible approach for determining whether the steps taken are reasonable. To that end, an objective determination would be made based on the specific facts and circumstances of the transaction. Sellers should consider a number of factors, including:

- The nature of the purchaser;
- The type of accredited investor that the purchaser claims to be;
- The amount and type of information that the seller has regarding the purchaser;
- The nature of the offering, such as the manner in which the purchaser was solicited to participate in the offering; and
- The terms of the offering, such as a minimum investment amount.

A seller using Proposed Rule 506(c) would have the burden of proving it is entitled to the exemption. It will be important for sellers to maintain adequate records documenting the steps taken to verify that a purchaser was an accredited investor. Sellers should require each purchaser to complete a questionnaire as part of a subscription package. The information the purchaser provides in the questionnaire would allow the seller to verify the purchaser's investor status. If a purchaser does not qualify as an accredited investor, a seller would not lose the ability to rely on the Proposed Rule 506(c) exemption so long as the seller took reasonable verification steps and reasonably believed the purchaser was an accredited investor at the time of sale.

## Economic Impact

The proposed rules to permit advertising in Rule 506 offerings and Rule 144A resale transactions should allow sellers greater access to capital by reaching more potential investors. This would likely enhance efficiency by reducing the costs associated with finding accredited investors. Access to a larger number of potential investors could spark greater competition among interested investors, and may result in a lower cost of capital for sellers. Further, advertising may allow sellers to reach investors directly, rather than through an intermediary, which may result in lower transaction costs and possibly a lower cost of capital for sellers. Permitting advertising would also alleviate a seller's uncertainty regarding whether certain Rule 506 offerings could be completed.

The SEC is seeking comments on or before October 5, 2012. We expect that the SEC will adopt its proposal shortly after the end of the comment period. The SEC's proposed rules would dramatically change the landscape of Rule 506 offerings and Rule 144A resale transactions. Companies need to consider how to proceed with these offerings and resale transactions in the future. If you have questions about the proposed rules or any other SEC rules, please contact your Baker Donelson attorney.